Supreme Court, U.S.
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No. 98-1298

In The

Supreme Court of the United States

October Term, 1998

ROBERT LANDAU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY AS TO THE QUESTIONS PRESENTED

The question presented is not whether drug or alcohol addiction, in and of itself, constitutes a defense to liability under 26 U.S.C. (Internal Revenue Code) § 6672. No such contention has been made by Petitioner. Rather, the question is whether, as a matter of law, the effects of excessive drug and alcohol use may be considered as part of the totality of the circumstances, to determine liability under § 6672, pursuant to the rule enunciated by this Court in Slodov v. United States, 436 U.S. 238, 98 S. Ct. 1778, 56 L. Ed. 2d 251 (1978).

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REPLY AS TO GOVERNMENT'S STATEMENT OF THE CASE

The Government contends that Petitioner was CEO of Robert Landau Associates, Inc. ("RLA") for the relevant tax periods (the "Tax Periods"), during which time RLA failed to pay over withheld taxes. (Brief for United States in Opposition, hereinafter "Opp. Brief", p. 2.) The Government's argument, and the Court of Appeals ruling in this regard, are contrary to the record of this case. It was uncontroverted that Petitioner held the title of CEO (A 4). By contrast, it was sharply disputed as to whether Petitioner actually performed the functions of CEO during the Tax Periods.

Notwithstanding Petitioner's title, Petitioner's subordinates at RLA ignored those instructions of Petitioner which they deemed inappropriate (A 9), including Petitioner's instruction given to officers, specifically including RLA's Chief Financial Officer, Nathan Unger, to promptly pay the withholding taxes (A 9-10).[1]

During the Tax Periods, even after treatment in a drug rehabilitation hospital, Petitioner ingested on a daily basis, six to eight grams of cocaine (twelve to sixteen times the amount needed to affect reasoning, according to expert testimony) plus a quart of alcohol. (A 6, Trial Transcript 117, 445-446.) Petitioner's co-workers, spouse and Petitioner himself testified

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[1]The Government concedes that Petitioner instructed RLA's other officers to pay the taxes. (See Opp. Brief, p. 2.) Unger was found liable under § 6672 by the jury. The District Court's order setting aside the verdict as to Unger as against the weight of the evidence was reversed and remanded by the Court of Appeals. (A 4, 25).

as to Petitioner's bizarre behavior (see Petition p. 4-5), and Petitioner's doctors and expert witnesses testified as to his inability to control his life and think rationally, during the Tax Periods. (A 8-9.) This evidence created a question of fact as to whether Petitioner actually controlled the finances of RLA during the Tax Periods so as to be a "responsible person" under § 6672, despite his titular position as CEO.

The Government's Brief herein reiterates the error of the Court of Appeals, and fails to heed the crucial distinction between the title of a corporate office, admittedly held by Petitioner, and actual control of the corporation and its finances, as to which issue the evidence was sharply disputed. The Second Circuit has commented on that distinction, in determining liability under § 6672:

> "...The power to sign checks and the holding of corporate office are indeed factors that courts have listed as helpful in deciding whether an individual possessed the necessary power, but they are only factors. Either can exist in circumstances where the individual in reality does not possess significant control over corporate finances. When this is so, the potentially devastating 'responsible person' liability should not be imposed...". United States v. Rem, 38 F. 3d 634, 646-647 (2d Cir. 1994) (concurring opinion of Judge Leval.)

The Government and the Court of Appeals cite Petitioner's actions in obtaining financing, negotiating contracts, and taking business trips, as evidence that Petitioner was in control of RLA so as to be a "responsible person" for payment of withholding taxes under § 6672. (Opp. Brief, p. 2, 6; A 6-7.) This argument raises only a question of fact, decided by the jury in favor of Petitioner, and not a question of law for the

court.[2]

The District Court held, as a matter of law, that Petitioner's "extreme addiction to alcohol and cocaine" (A 29) did not constitute a defense (A 29-33), which holding was affirmed by the Court of Appeals, on the law, as a "matter of policy" (A 27). Accordingly, the Government's argument, and the Court of Appeals' reliance on evidence that Petitioner conducted business activities during the Tax Periods, while relevant to the issue of whether the jury verdict was supported by evidence, is utterly irrelevant to the issue on which the case was determined: to wit, whether, as a matter of law, the effects of drug and alcohol addiction may be considered as part of the totality of the circumstances to determine whether Petitioner was a "responsible person" under § 6672.

POINT I

REPLY AS TO ARGUMENT

In U.S. v. Rem, 38 F. 3d 634 (2d Cir. 1994), an argument similar to that advanced by the Government herein was resoundingly rejected. Rem had held various offices in a closely held family corporation, and with approval of its board of directors, held himself out as President. He also negotiated

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[2]The District Court specifically declined to set the jury verdict in favor of Petitioner aside as being against the weight of the evidence, instead assuming for purposes of the Government's post-trial motion that the evidence fully supported the verdict (A 29-30). The Court of Appeals sub silentio denied (A 1-28) the Government's argument, contained in its Appellate Brief, that the District Court's Judgment should be affirmed on the grounds that the verdict in favor of Petitioner was against the weight of the evidence. Nor could the verdict have been set aside, given the overwhelming nature of the evidence and the Government's failure to call a single witness, fact or expert. (See Petition pp. 4-6.)

and signed, as President,[3] corporate credit agreements and the corporation's subsequent bankruptcy petition. Nevertheless, the Court of Appeals reversed summary judgment granted by the District Court for liability under § 6672, holding:

> "We see no necessary connection between negotiation of credit agreements and responsibility for payroll taxes sufficient to make evidence of the former binding proof of the latter as a matter of law. Further, the [district] court's conclusion contradicts the evidence presented by Rem that payroll matters were not within his domain." 38 F. 3d 634, 655, emphasis added.

Thus, to find liability under § 6672, the "authority" of an individual to pay withholding taxes must include both de jure and de facto authority. De facto authority, a matter sharply controverted by Petitioner at trial, raises an issue of fact, not law.

IRC § 6672 imposes personal liability only upon those corporate officials responsible for the employer's decisions regarding withholding and payment of taxes. Slodov v. United States, 436 U.S. 238, 247, 98 S. Ct. 1778, 1785 (1978). The teaching of Slodov and Rem is that de jure authority, arising from the holding of a corporate office, even when combined with business activities, including negotiating credit agreements (such as Rem negotiated), and even when the individual is also a significant shareholder in the corporation (as was Rem), is insufficient to impose 6672 liability without de facto authority. De jure authority, as a corporate officer, is insufficient to find liability as a matter of law. U.S. v. Rem, supra. Rather, these

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[3]Rem was also a shareholder, and had limited check signing authority on behalf of the corporation.

circumstances raise an issue of fact to be determined at trial, and not as a matter of law. Id.

As shown at pp. 15-16 of the Petition herein, the totality of the circumstances must be considered in determining whether one is a "responsible person" liable under IRC 6672. The Government inaccurately states the standard as being whether one has the de jure power, regardless of whether such "authority is not effectively exercised by the Defendant". (Opp. Brief, p. 6, bottom ¶ - p. 7, top line.) This is a significant misstatement of the law, and contrary to this Court's ruling in Slodov v. United States that IRC § 6672 "was not intended to impose liability without personal fault." 436 U.S. at 254, 98 S. Ct. at 1788. Thus, the decision of the Court of Appeals as to Petitioner is in conflict with this Court's precedent in Slodov.

The Government attempts to distinguish Slodov, as holding merely that one may not be held personally liable for unpaid corporate withholding taxes incurred at a time that the individual was not a corporate officer. (Opp. Brief, p. 8.) According to the Government, Slodov is "plainly not applicable to the wholly different facts of this case". (Opp. Brief, p. 8, top ¶). Slodov has never been limited to its precise facts as now urged by the Government. Nor have the Courts of Appeals ever viewed Slodov as being so limited.

The Government reads Slodov far too narrowly, and its overly constricted reading should be corrected by this Court. Slodov and its Circuit Court of Appeals progeny stand for the proposition that the totality of the circumstances, including but not limited to the factors enumerated in the cases cited at pp. 15-16 of the Petition herein, are to be considered in determining whether one is a responsible person under § 6672, thus raising a classic fact question for trial.

Slodov also stands for the proposition that § 6672 "was not intended to impose liability without personal fault", and

should be construed to respect the Congressional policy choice, which "has not made corporate officers personally liable for the corporation's tax obligations generally." 436 U.S. at 254, 98 S. Ct. at 1788. The ruling and the Government's argument herein as to Petitioner is thus in conflict with this Court's holding in Slodov.

The issue as to Petitioner was sent to the jury under an entirely proper jury instruction (quoted at Petition pp. 6-7) that Petitioner's contention, if established, raised a "very narrow defense." Id. The jury found in favor of Petitioner, in response to a jury interrogatory, specifically finding that Petitioner "was not able to effectively exercise significant control over the corporation's finances to cause the withheld payroll taxes to be paid" (A 10). Both the District Court and the Court of Appeals declined to set aside the jury verdict as to Petitioner as against the weight of the evidence. See Fn 2, supra.

In these circumstances, the Government's position appears to be a thinly disguised attempt to rewrite the law established by this Court in Slodov, solely to reach a desired outcome, thus calling to mind the maxim that "hard cases make bad law." Petitioner's response to this argument is that offered by Justice Rehnquist, joined by Justices Brennan, Stewart and Stevens, in dissent, that:

> "The Government undoubtedly needs the revenues it receives from taxes, but great as that need may be I cannot join the Court's thrice-twisted analysis of this particular statute to gratify it." United States v. Sotelo, 436 U.S. 268, 282, 98 S. Ct. 1795, 1803, 56 L. Ed. 2d 275 (1978)

While it would certainly be convenient (not to mention lucrative) for the Internal Revenue Service if the test were merely whether one served as corporate CEO, conducted

business and had de jure authority over the corporation's finances, such a rule would indeed "impose liability without personal fault" and thus violate of the Congressional "policy choice" of § 6672 as recognized by this Court in Slodov v. U.S., supra, 436 U.S. at 254, 98 S. Ct. at 1788.

In an effort to avoid the jury verdict in favor of Petitioner, the Government mischaracterizes certain Court of Appeals decisions, cited at Opp. Brief, p. 8 bottom paragraph. The Government's most egregious misreading occurs as to United States v. Rem, supra, where the issue was whether the president of a corporation in fact exercised the authority of president, notwithstanding his corporate title. (See p. 4, infra.) This can hardly be classified as the virtually rote analysis argued for by the Government, which would apparently end upon determining that Petitioner held the title of CEO, was a shareholder, and engaged in business activities.

The Government also misreads Gephart v. United States, 818 F. 2d 469 (6th Cir. 1987) (Opp. Brief, p. 8 at bottom paragraph). Gephart was general manager, but not an officer, director or shareholder of the corporation. Gephart held that the test for liability under § 6672 "is essentially a functional one, focusing on the degree of influence and control which the person exercised over the financial affairs of the corporation...," and "basically a factual inquiry" as to the "existence of significant, as opposed to absolute, control of the corporation's finances," 818 F. 2d 469, 473.

The Government similarly misconstrues Raba v. United States, 977 F. 2d 941 (5th Cir. 1992) (cited at Opp. Brief, p. 8), wherein the Court of Appeals held that "we look behind a person's official title or job description to determine whether he had the actual duty or ability to pay over the taxes owed." 977 F. 2d at 943, emphasis added.

POINT II

THE GOVERNMENT HAS MADE NO RESPONSE TO PETITIONER'S ARGUMENT THAT THE STATED POLICY BASIS FOR THE COURT OF APPEALS DECISION HEREIN CONFLICTS WITH CONGRESSIONAL POLICY WITH REGARD TO IRC § 6672 AS ENUNCIATED BY THIS COURT IN SLODOV V. UNITED STATES

The Government totally fails to respond to Petitioner's argument (Petition Point III, pp. 26-29) that the Court of Appeals ruling herein, explicitly made as "a matter of policy" (A 27), was erroneous in that it conflicts with this Court's holding in Slodov v. United States, 436 U.S. 238, 98 S. Ct. 1778, 56 L. Ed. 2d 251 (1978), that IRC § 6672 was "not intended to impose liability without personal fault," and should be construed to respect the "policy choice" of Congress which "has not made corporate officers personally liable for the corporation's tax obligations generally." 436 U.S. at 254, 98 S. Ct. at 1788.

The Second Circuit's "policy" ruling as to Petitioner was based solely upon two Bankruptcy Court decisions, In re Correa, 58 B.R. 88 (Bankr. N.D. Ill. 1986) and In re Berzon, 145 B.R. 247 (Bankr. N.D. Ill. 1992), both decided by the same Bankruptcy Judge, and neither of which had anything to do with the issue or facts herein. These Bankruptcy Court opinions, as to the obligation of an individual to file an income tax return (Berzon), and the obligation of a debtor under bankruptcy protection to file statements of financial affairs and attend creditors' meetings (Correa), not rendered by an Article III Judge, constitute the most slender of reeds to support a "policy" holding as to IRC § 6672, in conflict with the Congressional policy as explicitly found by this Court in Slodov, supra. Any

such new policy should be made only by Congress, or at least enunciated by this Court rather than the Court of Appeals, as it alters a Congressional policy as found by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
April 27, 1999

Respectfully submitted,

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